United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1048

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By mail

To be argued by
ROBERT LEIGHTON

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

EARL FODDRELL,

Appellant.

BRIEF AND APPENDICES FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

APPELLEE, :

- against - : DOCKET NO.: 75 - 1048

EARL FODDRELL, :

APPELLANT. :

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STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered January 30, 1975, in the United States District Court for the Southern District (Gagliardi, J.) convicting Appellant Foddrell after trial of unlawfully possessing with intent to distribute a Schedule I narcotic drug in violation of Title 21 U.S.C. Sections 812, 841 (a)(1) and 841 (b) (1). Appellant was sentenced to a term of imprisonment of 10 years and a 6-year special parole to commence upon expiration of his confinement. These sentences were directed to run currently to those imposed under Indictment 73 Cr. 229.

QUESTIONS PRESENTED

1. WHETHER THE TRIAL JUDGE WHO HAD SEEN APPELLANT'S PRE-SENTENCE REPORT AT THE CONCLUSION OF THE PRIOR TRIAL SHOULD HAVE DISQUALIFIED HIMSELF FROM PRESIDING OVER THE PRESENT TRIAL IN ORDER TO AVOID ANY POTENTIAL PREJUDICE.

2. WHETHER THIS COURT SHOULD ORDER THE CASE REMANDED FOR A HEARING TO DETERMINE THE LEGALITY OF THE WIRE INTERCEPTS.

3. WHETHER THE COURT'S REFUSAL TO GRANT APPELLANT'S APPLICATION FOR A SEVERANCE DEPRIVED HIM OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

4. WHETHER THE PROSECUTOR'S SUMMATION WAS SO PREJUDICIAL AND INFLAMMATORY THAT IT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

5. WHETHER THE 15-MONTHS DELAY BETWEEN THE DATE OF THE ALLEGED CRIME AND APPELLANT'S ARREST PREVENTED HIM FROM EFFECTIVELY PREPARING HIS DEFENSE, THEREBY REQUIRING THE DISMISSAL OF THE INDICTMENT.

STATEMENT OF FACTS

Appellant and two co-defendants, Jule Byrd and Lonnie Thomas (a/k/a Lonnie Youngblood) were charged in an indictment filed on September 19, 1973, with conspiring to violate Title 21 U.S.C. Sections 812, 841 (a)(1) and 841 (b)(1)(A). The three defendants were also charged with violating the aforementioned sections in that on or about June 13, 1972, they knowingly possessed with intent to distribute and did distribute approximately 140.3 grams of heroin hydrochloride.*

Prior to the filing of this indictment (73 Cr.R. 869), all three defendants were named along with others in another indictment (S.73 Cr.R. 229) charging them with the commission of similar crimes. Appellant entered a plea of guilty to the conspiracy count of this latter indictment on April 2, 1973 and on July 31, 1973 was sentenced to a term of 12 years to be followed by a 5-year special parole. (Gagliardi, J.)** Thereafter, in September of 1973 Appellant was arrested on the present indictment but was not arraigned on this indictment until February 4, 1974.

Because the conspiracy count to which Appellant had already pleaded guilty was similar to the conspiracy count charged in the present indictment, Judge Charles Tenney on April 25, 1974 dismissed the conspiracy count on double jeopardy grounds. Accordingly, the defendants were tried only on the single possessory count of the present indictment.

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* The indictment is set forth in its entirety in the Appendix, A. 5.

** It should be noted that pursuant to a motion for a reduction of this sentence, Judge Gagliardi reduced Appellant's sentence to 11 years. Additionally, there is an application presently pending before Judge Gagliardi to withdraw the aforementioned plea of guilty.

Application for a hearing to determine the legality of wiretaps.

On November 18, 1974, appellant's counsel informed the Court that some wiretaps existed in either the present case or another case which might have made reference to the facts of this case. (min. of 11/18/74, pp. 2-3) Counsel maintained that on the day the crime allegedly was committed there was wiretap evidence showing that between 8:00 a.m. and 4:00 p.m., appellant made approximately 17 telephone calls. It was further pointed out that appellant was a party to 2260 telephone calls and the Court had spent 11 days listening to the wiretaps pursuant to counsels' motions on the prior indictment. The Court concurred, stating that the defendants had pleaded guilty to that indictment during the wiretap hearing and therefore no ruling had been made regarding minimization or the legality of the wiretaps. (id. at pp. 8-9) It was later agreed, however, that appellant's name was repeatedly mentioned during the minimization hearing and that there were wiretaps with respect to all three defendants. (min. of 11/20/74, at pp. 20, 26)

When the question arose as to the timeliness of appellant's motion, his counsel stated that he was only assigned to this case on February 8, 1974 and had made a motion for a bill of particulars that was never decided.*

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* The bill of particulars is set forth in the Appendix, A. 8.

In his motion for a bill of particulars, he attempted to ascertain what wiretaps existed and whether any statements had been taken from his client. Counsel explained that as he did not represent appellant on the prior matter, he never heard the wiretaps. According to counsel, if the bill of particulars had been answered, he would have known which motions to make as he did not want to make frivolous motions. (min. of 11/18,74, pp. 14-15)

The Government responded that the bill of particulars had not been settled as counsel was out of the country for an extended time. However, the Government did acknowledge that although there had been wiretapping, the Government would not offer any wiretap evidence on its direct case and would use it only for purposes of cross examination. (id. at p. 18)

Pursuant to the court's inquiry, the Government represented that none of the information obtained from the wiretaps led to any information with respect to the present indictment. (id. at p. 19) The Court accepted the Government's representation and denied the motion for a hearing. (min. of 11/20/74, p. 27)

Application to dismiss the indictment on ground of undue delay in arresting the defendants.

All three defendants maintained that as the crime

allegedly was committed on June 13, 1972 and they were not arrested until September 20, 1973, this 20-months delay in arresting them unduly prejudiced them in the preparation of their defense. (min. of 11/18/74, p. 5)

On November 20, 1974, a hearing was held to ascertain, inter alia, why the Govermental agents delayed in making the arrests.

The facts adduced at the hearing established that the crime occured on June 13, 1972 but it was not until May of 1973 that Agent Garfield Hammonds while in the Drug Abuse Enforcement Office came across the photographs of the individuals involved in the crime. The Agents attempted to corroborate their identification by showing these pictures several weeks later to one Theodis Williams who was also a defendant in the case. (id. at pp.37-38). Williams identified appellant as the one who had allegedly received the money from the narcotic transaction occuring on June 13, 1972. (id. at p. 42) Williams also stated that he had known appellant several years and had had prior narcotic transactions with him. (id. at p. 41)

Agent Hammonds acknowledged seeing appellant in the vicinity of Freddie's Bar on the June 13th date but he next saw appellant when he arrested him on September 20, 1973. He did not recall ever asking Williams for a description of the men involved. (id. at pp. 46-47, 58)

The Court thereafter denied these motions to dismiss the indictment because of the undue delay in arresting the defendants.

MOTION TO DISQUALIFY THE COURT

On November 18, 1974, Mr. Bobick in behalf of both his clients, Defendant Youngblood, and appellant, requested that the Court disqualify itself. (min. of 11/18/74, p. 4-5) Counsel for Defendant Thomas first pointed out that the Court had listened to eleven days of wiretap hearings and as a result heard all the evidence adduced from those tapes. The Court responded that it was capable of putting such facts aside in the present case. Mr. Bobick then argued that both Youngblood and appellant have made motions to reduce their sentence which had been imposed as a result of their previous pleas of guilty. According to Mr. Bobick, the Court had heard all the information concerning their previous pleas. The Court in turn replied:

> I don't think it has anything to do with their trial on the merits in this case, which is a separate and distinct offense, no different from a second offender coming before any judge at any time. I don't think it is of any consequence at all. I wouldn't give it the least bit of consideration in handling this case in any way whatsoever. (id. at pp. 4-5)

Appellant's motion for a severance

In his opening statement for defendant Byrd, his counsel stated:

Mr. Byrd will take the witness stand if there is sufficient evidence to rebut. If may be that his Honor will decide that the Government has not got a sufficient case. But if his Honor decides there is a case, Mr. Byrd will take the witness stand. He will tell you that he is 42 years of age, supporting a wife and child, that he has never been convicted of a crime, and except for an army service in 1951 through 1953, where he received an honorable discharge, he has constantly been in the restaurant business. I leave it to him to enumerate most of the places he worked at . . . . . Here is a man whose entire life has been in the restaurant business, and he worked for Mr. Foddrell. The fact that he worked for Mr. Foddrell raises no inference of any criminality on his part. When he worked for Mr. Foddrell he did various things besides working there. He ran errands, such as picking up Mr. Foddrell's daughter at school, delivering sandwiches to various members of the family, accompanying Mr. Foddrell in a car for reasons best known to Mr. Foddrell, but not to him. And so when we come to June 13, no question that he pulled up in a taxicab to deliver a message. We are not denying that. He may even have been there on other occasions before that on the same night, but he was solely there as an errand boy to deliver a message, did not participate in any transaction of narcotics, if one took place. (15, 16 - emphasis supplied)*

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* Numerical references are to the pages of the trial transcript dated November 21, 1974.

Immediately after the opening statements, counsel requested a sidebar and thereafter requested a severance because of the co-defendant's opening statement. Counsel explained that he had learned for the first time at that point that the co-defendant was going to take the stand and admit being present at the scene of the alleged crime. Counsel stated that it had been his understanding that Byrd was not in fact present. The Court replied that while counsel might have been surprised by the testimony, this was not grounds for a mistrial. Counsel, however, responded that he was only requesting a severance. The Court then denied this motion. (19, 135)

After the Government rested its case, counsel for Defendant Byrd stated that he had advised his client to take the stand and explained to him why he should do so, but his client had decided not to testify. (422)

TRIAL

On June 13, 1972 at 5:00 p.m., Agent Garfield Hammonds was with an informant and other agents on 158th Street between the West Side Highway and Riverside Drive. (102) From that location, they proceeded to 119th Street and 8th Avenue where Agent Hammonds went into Freddie's Bar. (102-03) When Theodis Williams arrived, Hammonds had a conversation with him conerning a purchase of 1/8 kilogram of heroin. (104) Williams told

the Agent that he could get the heroin and the best thing to do would be to go out on the street to wait for his connection. (104) At about 6:00 p.m., a 1948 Kaiser pulled up in front of the Bar and appellant and Defendant Byrd got out of the car. (105) Williams told appellant what he wanted and said his customer would like some samples. Appellant, however, responded that he did not give out samples. (295, 107) Appellant then told the Agent that he could produce the requested amount of heroin since he had just received a shipment of 9 kilograms of heroin. Appellant further stated that the price would be $3,600 which would have to be paid in advance. (108) Williams told the Agent that he did not have to worry about the money since appellant was established with respect to narcotics and people trusted him. Williams also told the Agent that appellant owned the B & E kitchen on 135th Street and 8th Avenue. (112)

While they had all been discussing the deal, a man came out of the Supermarket who was very upset because a package had been fronted to another individual who had not returned with $1,300 that was owed. (113) Appellant told the Agent that he would have to look into this and would return. (113)

About 20 minutes later, appellant returned in the same car and stated they were ready to do business. Agent Hammonds gave $3,600 to Williams who in turn walked into the Supermarket

with appellant and Byrd. (118)

A short time later, appellant arrived at Freddie's Bar and instructed Williams to go into the bathroom. There Defendant Thomas handed Williams a package who in turn gave this package to Agent Hammonds at the Malibu Bar.

GOVERNMENT'S SUMMATION

The Assistant United States Attorney first commented:

> What this case is all about, ladies and gentlemen, is about the testimony and the record of this case.
>
> Now, this is the transcript, and that can be read to you in the jury room. Now, that is the record, what we refer to you as the record.
>
> And this is in the record. This is evidence. Government's Exhibit 1C. That is the only piece or exhibit that is before you in your deliberations.

In characterizing Williams' testimony, the Government stated:

> The Government called Mr. Williams to the stand and had him testify before you because he was there, and we have to take our witnesses in part where we find them.
>
> You saw him. You judge for yourself. If there had been a boy scout on 119th and Eight Avenue we would march him up in short pants and tell you what he did with the dope with these defendants. But that did not happen. (511)

Regarding the heroin, the Government emphasized:

> This is Government's Exhibit 1C. This is the poison and the heroin that is involved in this case. (514)

At the conclusion of the Government's summation,

defense motions for a mistrial based on the aforementioned statements were denied by the Court. (525-526)

ARGUMENT

POINT I

THE TRIAL JUDGE, WHO HAD SEEN APPELLANT'S PRE-SENTENCE REPORT AT THE CONCLUSION OF THE PRIOR TRIAL, SHOULD HAVE DISQUALIFIED HIMSELF FROM PRESIDING OVER THE PRESENT TRIAL IN ORDER TO AVOID ANY POTENTIAL PREJUDICE.

Before presiding over the present trial, the court was already thoroughly familiar with appellant's background as this same court had not only entertained appellant's plea of guilty to prior but recent charges but had also reviewed a pre-sentence report before sentencing him on July 31, 1973, on said charges. Although counsel requested that the court recuse itself for this very reason, the court denied the application, maintaining in effect that it could remain impartial. The refusal of the court to recuse itself from presiding over appellant's trial constituted reversible error.

Rule 32 of the Federal Rules of Criminal Procedure explicitly requires that the pre-sentence report "shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty". Thus, according to this section, the court who is to try a defendant may not under any circumstances see his pre-sentence report until his guilt is conclusively established. Since in this case the court was well acquainted with the facts contained in a recent but prior

pre-sentence report and still refused to disqualify itself from presiding at appellant's trial, such a refusal constituted a clear-cut violation of Section 32 of F.R.C.P.

In dealing with this precise question, the United States Supreme Court in Gregg v. United States, 394 U.S. 491 (1969) stated in reference to Rule 32 of the F.R.C.P.:

> Rule 32 is explicit. It asserts that the "report shall not be submitted to the court . . . unless the defendant has pleaded guilty or has been found guilty". This language clearly permits the preparation of a pre-sentence report before guilty plea or conviction but it is equally clear that the report must not, under any circumstances, be "submitted to the court" before the defendant pleads guilty or is convicted. Submission of the report to the court before that point constitutes error of the clearest kind. 394 U.S. at p. 492 (emphasis supplied)

The Court then went on to explain in Gregg, supra, why strict compliance to this section is so crucial:

> Moreover, the rule must not be taken lightly. Pre-sentence reports are documents which the rule does not make available to the defendant as a matter of right. There are no formal limitations on their contents, and they may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged. To permit the ex parte introduction of this sort of material to the judge who will pronounce the defendant's guilt or innocence or who will preside over a jury trial would seriously contravene the rule's purpose of preventing possible prejudice from premature submission of the pre-sentence report. No trial judge, therefore, should examine the report while the jury is deliberating since he may be called upon to give further instructions or answer inquiries from the jury, in which event there would be the possibility of prejudice which Rule 32 intended to avoid. Although the judge may have that information at his disposal in order to give a defendant a sentence suited

> to his particular character and potential for rehabilitation, there is no reason for him to see the document until the occasion to sentence arises, and under the rule he must not do so.

Hence, the court's protestations in this case that it could fairly and objectively preside over the trial despite having seen the defendants' pre-sentence reports does not satisfy the requirement of Rule 32 or the mandate of the Gregg decision. Under Gregg, the defendant does not have to show any actual prejudice resulting from the Judge seeing the pre-sentence report before presiding over the trial. As long as the potential for prejudice exists, as it did in the present case, the refusal of the court to recuse itself will be deemed reversible error.

Furthermore, the Government cannot claim in this case that the error was obviated by reason of the fact that the pre-sentence report referred to a prior case and not the case for which appellant was presently on trial. Such an argument would be utterly devoid of merit. First, the pre-sentence report was of recent vintage as appellant had been sentenced on the prior charges on July 31, 1973 only four months before the present proceedings. Thus, as appellant had been incarcerated since the imposition of that sentence, the pre-sentence report pertaining to the present case could contain no new facts. For all ostensible purposes the report would be essentially the same in both cases. Consequently, the court had no choice but to disqualify itself once it learned of the contents of the prior report.

While this Court has never dealt with this specific question, other Circuits have discussed the problem.

In United States v. Durhart, 496 F.2d 941 (9th Cir., 1974), the Ninth Circuit aptly recognized that strict compliance with Rule 32 was required under the Gregg decision although the Court held that they would not apply the rule to a prison report even though the judge chose to treat it as an informational substitute for a pre-sentence report.

In United States v. Small, 472 F.2d 818 (3rd Cir., 1972), the Third Circuit considered the same issue that is presented in the present case wherein the trial judge had refused to recuse himself after seeing a pre-sentence report pertaining to a defendant from a prior trial. The court, however, did not resolve the issue since it reversed the conviction on other grounds. cf. United States v. Gallington, 488 F.2d 637 (8th Cir., 1973); Mitchell v. Sirica, 502 F.2d 375 (D.C. Cir., 1974).

Thus, it is submitted that in accordance with the Gregg decision, this Court must reverse appellant's decision and order a new trial.

POINT II

THIS COURT SHOULD ORDER THE CASE REMANDED FOR A HEARING TO DETERMINE THE LEGALITY OF THE WIRE INTERCEPTS.

Title 18 U.S.C. Section 2518 (10)(a) specifically conferred upon appellant the right to suppress the contents of any intercepted wire communication or evidence derived therefrom on the grounds that:

"(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization."

Despite the fact that both the Government and the court were well aware that the Government had resorted to the use of wiretaps in this case and that appellant was an "aggrieved person" within the meaning of the above statute as he was a party to numerous wire intercepts, the court refused to hold an evidentiary hearing regarding the legality of these wiretaps.

The court below in denying the application for a hearing maintained first, that appellant's motion was not timely and second, the court accepted the Government's representation that none of the information obtained from the wiretaps led to any information with respect to the present indictment. The court's position cannot be sustained.

First, appellant's motion for a hearing, made before the commencement of the trial, must be deemed timely. As his counsel explained, he had made a motion for a bill of particulars wherein he attempted to ascertain what wiretaps existed. However, this motion was never decided. Moreover, counsel pointed out that he had only been assigned to represent appellant on February 8, 1974 and did not represent appellant on the prior matter. Therefore, he never heard the wiretaps. Simply because appellant did not have the same counsel for both his cases did not constitute a waiver of his right to any hearing in the present case. Counsel

in this particular case did everything possible to obtain information about the wiretaps and pursuant to Section 2518 (10)(a) of Title 18 U.S.C. he was entitled to a hearing. It is difficult to understand why appellant would be entitled to a hearing regarding the prior charges which were similar in nature to the charge for which he was on trial and yet denied a hearing in this case. Had the prior hearing reached a conclusion then perhaps the court below would have been correct in denying appellant a hearing. However, although the hearing conducted in the prior case encompassed 11 days, no decision was ever reached since defendants had pleaded guilty.

Second, counsel for appellant was entitled not only to listen to the tapes in order to determine whether the Government obtained any information from these wiretaps with respect to the present case but he was also entitled to a determination of whether the wiretaps were lawfully intercepted. It was undisputed that appellant was a party to numerous intercepts. On the day of the alleged crime, appellant made approximately 17 telephone calls and in total had been a party to 2260 telephone calls. Under these circumstances, a hearing was crucial in order that there be an objective determination of whether the Government obtained any information from the wiretaps that led to the present indictment, and it was error for the court below to rely on the Government's self-serving declaration that such information had not been obtained.

This Court has primarily been confronted with cases in which a hearing had already been held. Therefore, this Court only had to decide issues raised in conjunction with that hearing. United States

v. Rizzo, 491 F.2d 215 (2d Cir., 1974); United States v. Bynum, 475 F.2d 832 (2d Cir., 1973); United States v. Manfredi, 488 F.2d 588 (2d Cir., 1973); United States v. Birrell, 470 F.2d 113 (2d Cir., 1972). Only in United States v. Sanchez, 483 F.2d 1052 (2d Cir., 1973) did this Court have occasion to decide whether such a hearing was warranted. In Sanchez, where the only surveillance conducted was by means of a transmitter carried by an extortion victim as he met with defendant in restaurant parking lot, this Court held that the defendant was not entitled to a hearing. The present case, however, is readily distinguishable from Sanchez in that numerous wiretaps were apparently placed on many different telephones, and under these circumstances appellant should at the very least have been accorded a hearing.

In sum, this Court should remand the case for a hearing to determine whether the Government obtained any information that led to the present indictment and whether the wiretaps were lawfully intercepted.

POINT III

THE COURT'S REFUSAL TO GRANT APPELLANT'S APPLICATION FOR A SEVERANCE DEPRIVED HIM OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

In his opening statement, counsel for Defendant Byrd informed the jury that his client, an errand boy for appellant, would take the stand and would admit that he had accompanied appellant to the scene of the alleged sale but would testify that he had no knowledge

as to what appellant intended to do there. Immediately, appellant moved for a severance, claiming that he had not known that Byrd was going to take the stand and admit to being present at the scene. The court's refusal to grant the severance deprived appellant of his due process right to a fair trial.

There is no question but that Byrd's opening statement to the jury for all ostensible purposes was an acknowledgment that appellant, unbeknownst to Byrd, had been involved in the alleged sale of the drugs. Not only did Byrd implicate appellant in the crime but his counsel also in effect told the jury that his client should not be found guilty merely because of his association with appellant. Specifically, in this regard, counsel for Byrd stated "The fact that he worked for Mr. Foddrell raises no inference of any criminality on his part." While such comments in and of itself were inherently prejudicial, such prejudice was further exacerbated when Byrd subsequently refused to take the stand, and appellant could not cross examine him to test the truthfulness of his counsel's opening remarks. Thus, the jury had to be convinced by Byrd's damaging opening statement that appellant had in fact been involved in the sale of drugs as the Government maintained.

It is settled law that a trial court has a continuing duty during a trial to grant a severance if prejudice appears from the joint trial. United States v. Dineen, 463 F.2d 1036 (10th Cir., 1972); De Luna v. United States, 308 F.2d 140 (5th Cir., 1962); United States v. Jenkins, 496 F.2d 52 (2d Cir., 1974); Schaffer v. United States, 362 U.S. 511 (1960). And such prejudice is manifest in this case.

By refusing to grant the severance, appellant was deprived of his constitutional right of confrontation as he never had the opportunity of cross examining Byrd who refused to take the stand. Bruton v. United States, 391 U.S. 123 (1968); United States ex rel. Duff v. Zelker, 452 F.2d 1009 (2d Cir., 1971); United States ex rel. Nelson v. Follette, 430 F.2d 1055 (2d Cir., 1970). It must be pointed out that this is not a case where the request for a severance was made simply because appellant might have stood a better chance at an acquittal. United States v. Cassino, 467 F.2d 610 (2d Cir., 1972). Nor is this a case where appellant made statements similar to Byrd's /United States v. Spinks, 470 F.2d 64 (7th Cir., 1972)/ or where Byrd's statements could be admitted in furtherance of any conspiracy since no conspiracy was charged. /United States v. Projansky, 465 F.2d 123 (2d Cir., 1972)/. Instead this is a case where Byrd's opening statement was so "powerfully" incriminating to appellant that the court should have granted the requested severance. United States v. Gardner, 308 F. Supp. 425 (D.C.N.Y.S.D., 1969) However, even if the court was of the opinion that the statements made in reference to appellant in the opening did not warrant a severance, it was thereafter incumbent upon the court to direct the severance when it became clear that Byrd was not going to testify and that appellant would not have any opportunity to cross examine him.

Hence, as the Court's refusal to grant a severance resulted in a clear-cut denial of appellant's constitutional right of confrontation, his conviction must be reversed and a new trial ordered.

POINT IV

THE PROSECUTOR'S SUMMATION WAS SO PREJUDICIAL AND INFLAMMATORY THAT IT DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

The prosecutor in a federal trial is charged with the promotion of justice rather than the interests of any particular party to a controversy. As the Supreme Court stated in Berger v. United States, 295 U.S. 78 (1935), he is the representative of a sovereignty "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." id., at p. 68.

In this case, during his summation to the jury the Assistant United States Attorney repeatedly made inflammatory remarks which without a doubt were intended to arouse the passions of the jury. He also erroneously informed the jury that the transcript of the testimony could be read in the jury room. The cumulative effect of these remarks resulted in depriving appellant of his due process right to a fair trial.

First, the Government in no uncertain terms told the jury that the transcript of the testimony constituted the record in this case and could be examined and read by them in the jury room. Such a statement is clearly without any basis in law. No citation is necessary to support the proposition that the jury cannot under any circumstances read the transcript during their deliberations. Each juror has his own recollection of the facts and if his recollection is in conflict with other jurors, they may only request testimony to them. The Government's erroneous suggestion to the

jury had the effect of undermining each juror's right to have his own recollection of the facts controlled, and such a suggestion was not corrected by the court although counsel made a timely objection to this remark.

The Prosecutor then went on to vouch for the credibility of its witness, Theodis Williams. The Government clearly implied that indeed Williams was a credible witness notwithstanding the fact that they could not produce a boy scout in "short pants" to state what had transpired. While it is true that the Government must take its witnesses as they find them, they still may not use the vast power of their office to vouch for any witness' credibility. This is true no matter how disreputable the witness is that they produce. The Prosecutor's remarks here, albeit indirectly, conveyed the unmistakeable impression to the jury that the office of the United States Attorney General vouched for the truthfulness of Williams' testimony.

Finally, the Prosecutor characterized the heroin that was introduced into evidence as "the poison". Although appellant and his co-defendants were only on trial for possessing this drug with intent to distribute it, this remark conveyed the inference to the jury that the defendants in this case were perhaps responsible for the many deaths which occurred from the use of this drug. Hence, referring to the heroin as "poison" could only have the effect of unduly inflaming the juror's minds against the defendants.

In sum therefore, the total impact of the Prosecutor's summation in this case was such as to deprive appellant of a fair trial, thereby mandating the reversal of his conviction.

POINT V

SINCE THE 15-MONTHS DELAY BETWEEN THE DATE OF THE ALLEGED CRIME AND APPELLANT'S ARREST PREVENTED HIM FROM EFFECTIVELY PREPARING HIS DEFENSE, THE INDICTMENT SHOULD BE DISMISSED.

In this case, the sole charge against appellant was his alleged involvement in a sale of narcotics occurring on a specific date and at a specific time. Consistently maintaining his innocence of this charge, it was crucial to the preparation of his defense that he either remember his whereabouts at that particular time or that he produce some witness who could verify his whereabouts. Although the crime was allegedly committed in June of 1972, appellant was not arrested until September of 1973. As the Government failed to offer any plausible explanation for this undue delay in arresting appellant, it must be found that this 15-months delay precluded appellant from effectively preparing his defense. Accordingly, his conviction should be reversed and the indictment dismissed.

It is entirely unreasonable to expect that any person, let alone a defendant who is confronted with such a serious accusation against him, can remember his whereabouts at a specific time many months before. This is especially true if nothing momentous has happened to him that would implant that date in his mind.

Furthermore, this record unequivocally establishes that the Government intentionally delayed arresting the defendants. It is inconceivable that the Government agents could not locate the alleged perpetrators. According to their informant, appellant frequented the area where the sale took place; he owned a restaurant nearby; and most important, he had already been apprehended by Federal agents on related charges, had been indicted on said charges, and had pleaded guilty before they discovered that he allegedly was involved in another sale. Given these factors, it must be found that the Government's story that they accidently came across appellant's picture in their files is pure fiction. If the Government were truly interested in apprehending those who were involved in the June 13th sale, they simply had to show Agent Hammonds recent mug shots.

Hence, as Governmental officials intentionally delayed arresting appellant, it should be concluded appellant was in fact prejudiced in his ability to prepare an effective defense.

Furthermore, it cannot be said that merely because the delay between the charges and the arrest encompassed only 15 months, the prejudice inuring to appellant was mitigated. The United States Supreme Court in United States v. Marion, 404 U.S. 307 (1971) specifically stated:

> However, we need not, and could not now, determine when and in what circumstances, actual prejudice resulting from a pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and the most necessary delay; and no one suggests that every delay caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. 404 U.S. at pp. 324-25.

Thus, even a short delay can result in actual prejudice to a defendant.

Considering all the facts and circumstances of this case, it should be concluded that the unexcused 15-months delay between the alleged crime and arrest precluded appellant from effectively preparing his defense and now mandates the dismissal of the indictment against him. See United States v. Capaldo, 402 F. 2d 821 (2d Cir., 1968); United States v. Parrott, 425 F. 2d 972 (2d Cir., 1970); United States v. Feinberg, 383 F. 2d 60 (2d Cir., 1967)

CONCLUSION

FOR THE REASONS SET FORTH IN POINT V, THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED; ALTERNATIVELY, FOR THE REASONS SET FORTH IN POINTS I, III, AND IV, THE CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED; FOR THE REASONS SET FORTH IN POINT II, A HEARING SHOULD BE ORDERED.

MARCH 1975

RESPECTFULLY SUBMITTED,

ROBERT LEIGHTON
Attorney for Appellant
15 Park Row
New York, New York 10038
(212) CO7-6016

D. C. Form No. 100 — Docket Sheets — '73 CRIM. 869

CRIMINAL DOCKET

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Eugene F. Bannigan, AUSA
EARL FODDRELL	264-6346
JULE BYRD	
LONNIE THOMAS, a/k/a Lonnie Youngblood	
A. 1 dismissed 4/25/74	For Defendant:

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
(07)		DATE	NAME	RECEIVED	DISBURSED
Fine,					
Clerk, 2,3,1					
Marshal,					
Attorney,					
~~Commissioner Court~~ T. 21					
~~Witness~~ 846,812,841(a)(1),					
841(b)(1)(A) Distr.& possess.					
w/intent to distr.Sch.I(Heroin)(Ct.2)					
Consp. so to do.(Ct.1)					
(Two Counts)					

UNITED STATES COURT OF APPEALS FILED FEB 18 1975 A. DANIEL FUSARO, CLERK SECOND CI...

DATE	PROCEEDINGS
9-19-73	Filed indictment and ordered sealed. Bench warrants issued. Duffy,J.
9-20-73	Indictment ordered unsealed by Duffy,J.
	Deft.Foddrell brought on Bench Warrant(no appearance by atty.) Court directs a plea of not guilty.Bench Warrant vacated. Bail $50,000.P.R.B. Case assigned to Judge Tenney for all purposes. Duffy,J.
9-20-73	Deft. Foddrell-Filed warrant of arrest dtd.9-19-73 and executed 9-20-73.
9-20-73	E. FODDRELL- filed personal recognizance bond without security in the sum of $50,000. acknowledged before Clerk on 9-20-73.

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
9-19-73	ALL DEFTS- bench warrants issued.		
11-30-73	JULE BYRD- filed orig. papers filed with Mag. Raby: docket entry sheet indictment warrant, S.D.N.Y. disposition sheet appearance bond.		
1-30-74	E. FODDRELL-filed affdvt for writ of habeas corpus ad pros. Ret. 2-8-74.		
1-30-74	L. THOMAS-filed affdvt for writ of habeas corpus. ad pros. Ret: 2-8-74.		
2/21/74	L. Thomas- filed notice of motion re: dismissal ret. 3/4/74.		
2/22/74	E. FODDRELL-filed affdvt for writ of habeas corpus ad pros. ret" 1/31/74.		
2/22/74	L. THOMAS-filed affdvt for writ of habeas corpus ad pros. ret:1/31/74.		
3/11/74	E. FODRELL-Filed Govt's affdvt for writ of habeas corpus ad pros. writ issued ret: 3/12/74.		
/13/74	Filed Govt's notice of readiness for trial.		
3/19/74	Filed E. Foddrell's notice of motion re: dismissal,etc.		
4/22/74	Filed Govt's affdvt re: in response to the pending motion of deft Lonnie Thomas for dismissal.		
4/22/74	Filed Govt's memo of law in response to motion for dismissal.		
4/25/74	Filed OPINION #40637...defts Lonnie Thomas and Earl Foddrell have moved for an order dismissing the indictment,etc...At this time, however the motion is granted insofar as it seeks to dismiss count one and denied insofar as ti seeks to dismiss count two. Tenney,J.		
7/12/74	Filed Govt.'s Affdvt. for writ of habeas corpus ad pros. for Earl Foddrell ret. 7/17/74.		
7/18/74	Filed Govt.'s affdvt for writ of habeas corpus ad pros. against Earl Foddrell. The writ is allowed Ward,J. returned unexecuted.		
0/30/74	Filed Govt.'s affdvt. re: opposition to motion for dismissal by Foddrell.		

-cont'd. on next page-

DATE	PROCEEDINGS	Da Judg
10/29/74	Filed Govt.'s affdvt. for writ of habeas corpus ad pros. against deft. Earl Foddrell. Writ issued ret. 11/4/74.	
10/31/74	Filed deft. Earl Foddrell's notice of motion re: dismissal of indictment.	
10/31/74	Filed OPINION # 41384... Accordingly, deft. Foddrell's motion for dismissal of indictment is denied. Tenney,J. mn	
11/15/74	Filed Govt.'s affdvt. for writ of habeas corpus ad testificandum for Theodis Williams ret: 11/15/74.	
11/20/74	L. Thomas and J. Byrd - both defts. plead not guilty. before Judge Gagliardi jury trial begun, all defts.	
11/21/74	Trial cont'd.	
11/22/74	Trial cont'd.	
11/25/74	Trial cont'd.	
11/26/74	Trial cont'd. Deft. E. Foddrell-Guilty. deft. J. Byrd.-Guilty Deft. Foddrell remanded in lieu of bail $50,000. P.R.B. Byrd cont'd on present bail to cover Dist. of N.Y. and District of New Jjrsey. Pre-sentence investigation ordered for both defts, 1/15/75 at (9:30). Gagliardi,J.	
11/27/74	Trial cont'd and concluded. Jury unable to reach a verdict as to deft. L. Thomas. Deft.'s motion for a mistrial- granted. New trial set for 1/27/75 at 10. Gagliardi,J.	
11/25/74	Filed affdvt. for writ of habeas corpus ad testificandum, for Theodis Williams 11/21/74 returned unexecuted. (Witness not at Attica)	
12/5/74	E. Foddrell- filed Financial affdvt. CJA 23.	
12/9/74	Filed transcript of record of proceedings, dated. 11/22/74.	
11/20/74	E. Foddrell- filed writ of habeas corpus ad testificandum for T. Williams. Issued writ ret. 11/20/74.	
12/13/74	Jules Byrd, Earl Foddrell, Lonnie Thomas- filed papers orig. filed with Magistrate Raby: (1) docket entry sheet (2) disposition sheet	

-Over-

DATE	PROCEEDINGS	Date O Judgme
1/15/75	JULE BYRD (atty. present) Filed JUDGMENT deft. is committed to the custddy of the Atty. Gen'l. for imprisonment for a period of THREE (3) YEARS, and on condition that the deft. be confined in a JAIL TYPE or treatment institution for a period of SIX (6) MONTHS the execution of the remainder of the sentence is hereby suspended and the deft. placed on probation for a period of TWO & ½ YEARS, subject to the standing probation order of the Court. Pursuant to 3651 of T. 18 U.S. Code, as mamended. Pursuant to the provisions of Sec. 841 of T. 21, U.S.Code. deft. is placed on Speci Parole for a period of THREE (3) YEARS, tocommence upon expiration probation. The deft. is to surrender to U.S. Marshal on 1/27/75 at 9:30AM. Deft. is continued on present bail until date of sentence. Gagliardi,J. issued all copies.	
1/17/75	T. Williams- filed writ of habeas corpus ad testificandum for T. Williams. 11/21/74 superceded by new writ. J. Barefoot,U.S.M.	
1/24/75	Filed Ex-Parte Order- deft. Earl Foddrell re: visit with wife and daughter on 1/25/75 ,etc. Gagliardi,J.mn	
1/27/75	Before Judge Gagliardi- jury trial begun as to Lonnie Thomas.	
1/28/75	Trial cont'd.	
1/29/75	Trial cont'd. and concluded. Jury verdict deft. not guilty. Gagliardi,J.	
2/3/75	Earl Foddrell- filed notice of appeal from judgment of 1/30/75. mailednotices. Leave to file appeal in forma pauperis is granted. Gagliardi,J.	
1/30/75	Earl Foddrell- filed Judgment (atty. present) deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of TEN (10) YEARS. Pursuant to the provisions of Section 841 of Title 18, U.S. Code, deft. is placed on Special Parole for a period of SIX (6) YEARS to commence upon expiration of confinement. Sentence is to run CONCURRENTLY with sentence imposed on Judgment dated 10/25/74 on indictment 73 Cr. 229. Deft. is to be given credit for time already served on previous conviction. Pursuant to Section 4208(a)(2) of T. 18, U.S. Code, deft. shall become eligible for Parole at such time as the Board of Parole may determine. Deft. advised of right toappeal. Gagliardi,J. issued all copies.	
2-13-75	Filed Transcript dated 11/20,21,22/75	
2-13-75	Filed Transcript dated 11/27/75	
2-13-75	Filed Transcript dated 11/26/75	
2-13-75	Filed Trans. dated 11/25/75	
2-13-75	Filed Trans dated 11/22/75	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By
Deputy Clerk

USA-33s-538 - IND /INF (Conspiracy to distribute and possess with
Rev. 5-27-72 — INDICTMENT — :otic drug.)

EFB:rs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x 73 CRIM. 869

UNITED STATES OF AMERICA, :

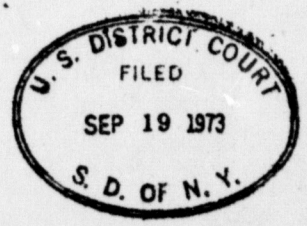
-v- : INDICTMENT

EARL FODDRELL, JULE BYRD and LONNIE THOMAS, a/k/a "Lonnie Youngblood," : 73 Cr.

:

Defendants . :

- x



The Grand Jury charges:

1. From on or about the 1st day of January, 1972 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, EARL FODDRELL, JULE BYRD and LONNIE THOMAS, a/k/a "Lonnie Youngblood," Theodis Williams named herein as a co-conspirator but not as a defendant, and the defendants and/others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By _____
Deputy Clerk

A-5

USA-33s-527A - IND/INF - strib. Possess Narc. Drug Succeeding Count)
Rev. 5-27-72

EFB:rs

SECOND COUNT

The Grand Jury further charges:

On or about the 13th day of June, 1972

in the Southern District of New York,

EARL FODDRELL, JULE BYRD and LONNIE THOMAS,
a/k/a "Lonnie Youngblood,"

the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 140.3 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

Martin Foley
Foreman

Paul J Curran
PAUL J. CURRAN
United States Attorney

A-6

EFB:rs

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about June 13, 1972 Theodis Williams entered Freddies Bar at 119th Street and 8th Avenue, New York, New York.

2. On or about June 13, 1972 EARL FODDRELL and JULE BYRD drove a 1948 Kaiser bearing New Jersey license VWS-339 in the vicinity of 2208 8th Avenue, New York, New York.

3. On or about June 13, 1972 Theodis Williams handed EARL FODDRELL $3600.

4. On or about June 13, 1972 EARL FODDRELL drove a 1969 Buick Electra bearing New Jersey license VHS-313 in the vicinity of Freddies Bar at 119th Street and 8th Avenue, New York, New York.

5. On or about June 13, 1972 EARL FODDRELL and Theodis Williams entered Freddies Bar at 119th Street and 8th Avenue, New York, New York.

(Title 21, United States Code, Section 846.)

— Bill of Particulars —

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-Against-

EARL FODDRELL et al,

Defendants.

NOTICE OF MOTION

73 CR 869

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of ROBERT P. LEIGHTON, ESQ., attorney for the defendant EARL FODDRELL, and upon all the proceedings had heretofore herein the defendant will move this Court at a Trial Term thereof to which the case has been assigned before the Hon. CHARLES H. TENNEY, District Court Judge for the Southern District of New York at Foley Square, New York at a date and time convenient to the Court for an Order seeking the following relief:

1. The defendant seeks an order to dismiss the within indictment pursuant to Rule 12 (B) (2) of the Federal Rules of Criminal Procedure.

2. The defendant seeks pursuant to rule 16 of the Federal Rules of Criminal Procedure:

(a) An order requiring the Government to produce for his inspection copying and recording, any and all purported confessions, admissions or statements allegedly made by him jointly and separately, to officers of agents of the Government, or persons acting in their behalf and at their behest, whether such are reduced to writing or not, or recorded by any means or not, so long as the same are within the possession, control or custody of the Government.

(b) Statements made by any of the co-defendants herein dealing with the subject matter of the indictment, made to any official agency employee, formal or otherwise of the Government. It is also necessary to determine whether or not a motion for separate trial is in order.

(c) Statements in any way obtained or recorded

of the defendnats herein regardless of whether such statements are dsignated a confession or an admission.

3. The defendant moves as a predicate for appropriate motions under Rule 41 of the Federal Rules of Criminal Procedure for an Order requiring the Government to disclose the following:

(a) For an order directing the United States Attorney for the Southern District of New York to disclose whether or not, in connection with this case, there has been electronic eavesdropping or wiretapping directed either against the telephone or premises used or occupied by the defendant or directed against the telephone or premises used or occupied by others in which the defendant's voice was overheard or his name identified or activities discussed and if such tapping and/or eavesdropping has occurred, to furnish the defendants each and every application for an order of return of an order connected with the interception of conversations over telephones listed to or controlled by the defendant and telephones over which the defendant's voice is claimed or alleged to have been heard or any other conversations which became the subject of eavesdropping by any other means in which conversations the defendant participated or was referred to directly or indirectly; also the defendant asks for copies of any transcripts made of any of the electrical eavesdropping, plus an opportunity to listen to any of the recordings of any of the defendants.

(b) Any and all objects, documents, or other kind of matter which the Government will claim it has seized from the defendant's person, possession, actual or constructive or premises.

4. The defendant moves, pursuant to Rule 7 (f) of the Federal Rules of Criminal Procedure for an Order requiring the Government to serve and file a Bill of Particulars setting forth the following:

AS AND FOR THE COUNT

OF CONSPIRACY

United States of America vs.

United States District Court for

DEFENDANT: EARL FODDRELL

THE SOUTHERN DISTRICT OF NEW YORK

JUDGMENT

NO. 73 Cr. 869

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: January 30, 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL ROBERT LEIGHTON (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding verdict of { [ ] NOT GUILTY. Defendant is discharged; [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 140.3 grams of heroin hydrochloride. (Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) years. Pursuant to the provisions of Section 841 of Title 18, U.S. Code, defendant is placed on Special Parole for a period of SIX (6) years to commence upon expiration of confinement. Sentence is to run CONCURRENTLY with sentence imposed on Judgement dated October 25, 1974 on Indictment 73 Cr. 229. Defendant is to be given credit for time already served on previous conviction.

Pursuant to Section 4208 (a)(2 of Title 18, U.S. Code, defendant shall become eligible for Parole at such time as the Board of Parole may determine.

SPECIAL CONDITIONS OF PROBATION

Defendant advised of right to appeal.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

LEE P. GAGLIARDI

Date 1/31/75

AFFIDAVIT OF SERVICE

Re: 75-1048
U.S.A. v. Earl Foddrell

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellant.

That on the 24th day of MARCH, 1975, I served the within Brief & Appendices for Appellant in the matter of United States of America v. Earl Foddrell, upon Paul Curran, Esq., United States Attorney, Southern District, of New York, United States Courthouse, Foley Square, New York, New York 10007 by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 24th day
of March 1975.

Lorraine Leotta
A Notary Public of the
State of New Jersey.
LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977.